IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-401

BOARD OF COMMISSIONERS OF THE MISSISSIPPI STATE BAR,
Petitioner

v.

THE FEDERAL LAND BANK OF NEW ORLEANS,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the Federal Land Bank of New Orleans, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion of the Fifth Circuit Court of Appeals is reported at 597 F.2d 459 (5th Cir. 1979), and is found in the Appendix to the Petition.

QUESTIONS PRESENTED FOR REVIEW

During 1973, the Federal Land Bank of New Orleans became concerned over the increasing time lapse between the filing of a loan application and the disbursement of loan proceeds. In 1974 the Bank implemented a loan closing procedure designed to shorten the time lapse and thereby provide the users of its credit service with greater efficiency and economy. New loan closings were to be handled almost exclusively by Association personnel and closing attorneys. As a part of this procedure, a decision was made to reduce the number of attorneys approved for closing loans by seventy percent in the states of Mississippi, Alabama and Louisiana.

As a result of the decision to reduce the list of approved attorneys this litigation was initiated. It is the position of the Federal Land Bank of New Orleans that no issues should be reviewed by the United States Supreme Court. The District Court for the Northern District of Mississippi and the Fifth Circuit Court of Appeals decided correctly the following questions:

1. Does the attorney approved by the Federal Land Bank of New Orleans, at least in part, represent the Bank?

2. May the Federal Land Bank of New Orleans as a federally created lending institution, with strong private enterprise characteristics select an attorney based upon subjective determinations of Federal Land Bank personnel without violating due process provisions of the Fifth Amendment?

3. Were the actions of the Federal Land Bank of New Orleans in reducing the number of attorneys it uses in loan closing procedures a violation of the Sherman Antitrust Act?

ADDITIONAL STATUTES IN CODE OF FEDERAL REGULATIONS INVOLVED

In addition, to the statutes cited by the Petitioner, the following statutes and the Code of Federal Regulations are involved:

12 U.S.C. § 2001

12 U.S.C. § 2012

12 C.F.R. § 600.20.

STATEMENT OF FACTS

The Federal Land Bank of New Orleans is a federally chartered, privately owned, privately capitalized federal instrumentality which makes long-term first mortgage loans on farm land, to farmers and ranchers through its Associations in Mississippi, Alabama and Louisiana. The Federal Land Bank of New Orleans (hereafter referred to as the Bank) is one of twelve Federal Land Banks chartered in 1917 pursuant to Section Four of the Federal Farm Loan Act, 39 Stat. 360, and continued under the Farm Credit Act of 1971, Public Law 92-181, 12 U.S.C. § 2001-2259 (1977 Supp.).

Each of the twelve Federal Land Banks is composed of Associations in the area of operation of the Federal Land Bank of New Orleans. Twelve of these Associations are in Mississippi. The Federal Land Banks and the Associations are part of a comprehensive farm credit system under the supervision of the Farm Credit Administration. 12 U.S.C. § 2002 (Supp. 1977).

Regulations promulgated by the Farm Credit Administration pertaining to Federal Land Banks and

their Associations are found in Title Twelve of the Code of Federal Regulations, § 600-619 (1977). The regulations contain the procedural steps for making Land Bank loans. The prospective borrower makes application to the Land Bank Association in his area, pays application appraisal fees to the Association whose personnel review the borrower's credit, appraise the property constituting the primary collateral, and approve the loan. The borrower then selects one of the attorneys on the Bank's approved list to initiate the appropriate title examination and certify to the Bank the status of the title. The attorney, in addition to these duties, assembles the necessary data from which the promissory note and deed of trust are to be prepared. In addition, the attorney supervises the loan closing and sees that the instruments are recorded thereby protecting the interest of the Bank.

The note and security instruments which are prepared by the attorney are placed by the Bank in a pool of collateral securing Federal Land Bank bonds which are sold by a fiscal agent representing all twelve Land Bank districts. The proceeds from the sale of these bonds, together with accumulated profits from interest on loan payments and income from mineral rights which the Bank owns in the area, constitute the operating capital and funds from which loans are made.

The Bank is required by federal law and regulations to accept only first mortgage loans. Section 2017 of the Farm Credit Act sets forth security requirements for Land Bank loans as follows:

> Loans shall not exceed eighty-five percentum of the appraised value of the real estate security, and shall be secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration. 12 U.S.C. 2017 (Supp. 1977).

Title Twelve of the Code of Federal Regulations provides for first lien security.

> The principal function of the Federal Land Bank is to make first mortgage loans on farm lands to eligible applicants. 12 C.F.R. 600.20 (1977).
>
> Primary security for a federal land bank loan shall consist of a first lien on interest in real estate. 12 C.F.R. 614.4230 (1977).

Section 615.5060 of Title Twelve of the Code of Federal Regulations describes the role and responsibility of the Bank's attorney as follows:

> (a) If the chief counsel for a Federal Land Bank has determined in writing that bank procedures provide sufficient safeguards to assure that a loan made by the bank will be secured by a first lien or its equivalent on interest in the primary real estate security, an attorney lien certification need not be obtained at the time a note is accepted for collateral. The note shall be withdrawn from collateral upon the expiration of one year from the date of loan closing, unless before the end of such period, an attorney has certified that the interest of the bank in the primary real estate security for that loan is a first lien on the borrower's interest or its equivalent from a security standing point. 12 C.F.R. 615.6050(a) (1977).

To comply with the Federal requirements, the Bank has maintained a list of approved attorneys for more than fifty years. Attorneys have been selected by the Bank upon recommendations of field personnel, recommendations of fellow practitioners and by reference to publications such as *Martindale-Hubbell Law Directory*. Through the years, the list of approved attor-

neys grew to over fourteen hundred firms, or approximately three thousand to thirty-five hundred attorneys in the three-state area. Many firms had a longstanding association with the Bank but had closed few loans over the years for varying reasons.

In 1973 the Bank determined that the time lapse between the filing of a loan application and the disbursement of loan proceeds was not in the interest of its customers. It took longer to close loans in only three of the other Land Banks in the country. One Bank closed loans twenty-eight days faster than the Federal Land Bank of New Orleans.

In 1974 the Bank implemented a loan closing procedure designed to provide the users of its credit services with greater efficiency and economy. A decision was made that one route to eliminate the delay was to reduce the number of attorneys approved for closing loans by seventy percent in Mississippi, Alabama and Louisiana. The smaller number of attorneys would improve communications between the Bank and its attorney in implementing more efficient closing requirements. The decision was made by the interaction of Association personnel, the Executive Committee of the Bank, and the Bank's Board of Directors. The Bank sought opinions from field personnel and others to determine which attorneys should remain on the list. The Bank's General Counsel's Office reviewed the attorneys submitted, consulted with staff attorneys concerning the promptness of closing attorneys and made independent additions which culminated in the final list of attorneys selected as approved.

In September 1974 the Bank mailed letters to the firms which had been removed from the list informing

them of the removal. In October 1974 the Bank sent letters to all its borrowers explaining the efforts being made by the Bank to reduce the closing time.

The Bank stressed as strongly as possible its position that the removal of the attorneys from the approved list was not intended as a reflection upon their competency or reputation, but was intended only to achieve a more manageable number of attorneys.

In the fall of 1974 the Plaintiff in this action, Mr. John Sibley, Attorney at Law of Okolona, Mississippi, brought suit for and on behalf of himself and all other lawyers similarly removed from the list. A year and a half later the Board of Commissioners of the Mississippi State Bar filed its Complaint as Applicant for Intervention, alleging that the Bank acted in an arbitrary and capricious manner in regard to the elimination or retention of attorneys on its approved list. The Board of Commissioners further alleged that this arbitrary action was a violation of the due process requirements of the Constitution of the United States and was in restraint of trade.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Attorney In The Loan Closing Process, Between The Bank And The Borrower, Represents The Federal Land Bank Of New Orleans; Therefore, Regardless Of How He Is Selected, It Does Not Implicate The Constitution Or The Sherman Antitrust Act.

The United States District Court in this cause, found as a fact that the attorney represented the Bank. The attorney certified that the title was good. He further prepared the note and the deed of trust. All of these acts were for the benefit of the Bank. The Fifth Circuit Court of Appeals agreed with the fact finding of the District Court.

It is the generally accepted view that when one lawyer is involved in the loan closing procedure, he represents the lender in regard to the title, the preparation of the note, and the preparation of the deed of trust or other security instrument. *See Florida Bar* v. *Teitelman,* 261 So.2d 140 (Fla. 1972); *The Proper Role of the Lawyer in Residential Real Estate Transactions: a Report of the Committee on Residential Real Estate Transactions of the A.B.A.* (1974). The original finder of fact, the United States District Court, expressed the position in such a straight forward and unequivocal manner that the Bank in seeking to show why the Petition for Writ of Certiorari should be denied offers, as an expression of its position, a portion of the Memorandum of Decision:

> It is inconceivable that the Court by judicial fiat should compel the Bank to accept the services of any Mississippi attorney, who might or might not be acceptable to it, but who is qualified to perform the work necessary to properly close a loan for the Bank pursuant to reasonable standards established by the Bank under the Court's supervision. In such a case, the Bank would not have any control over the number of attorneys in a given state who would be authorized to close its loans, and the result would be an inefficient and unsatisfactory method of loan closure from which both the Bank and the borrower would suffer. As the United States Court of Appeals for the Fifth Circuit said in a per curiam opinion released December 9, 1974, in *Forrest* v. *Capital Buildings and Loan Assn.,* 504 F.2d 891 (1974), *cert. den.,* 421 U.S. 978. "We agree with the Defendant . . . that [its] procedures are in accordance with the basic and fundamental right of all persons to use counsel of [its] own choice and within the requirements of state and federal law." Memorandum of Decision, *Sibley* v. *Federal Land Bank of New Orleans,* No. EC74-116-S (N.D. Miss., April 19, 1977).

Similar reasoning was set forth in *Wittenbrock* v. *Parker,* 102 Cal. 93, 36 P. 374 (1894), wherein the California Supreme Court held that regardless of who paid the attorney, he was the attorney for the lender.

The District Court further opined

> The Bank must look to the attorney who certifies the title to provide the Bank with a good, valid and enforceable first mortgage lien on the property involved. Being under such an obligation to the Bank it can hardly be said that the attorney does not represent the Bank in closing a loan or that the relationship of attorney and client does not exist. It is true that the borrower must pay the fee of the attorney for closing the loan, but this is only a part of the loan transaction, just as other expenses, such as appraisal fee, recording costs, etc. Such is the normal procedure in the industry. *Sibley* v. *Federal Land Bank of New Orleans, supra.*

The District Court and the Fifth Circuit Court of Appeals determined that the attorney represented the Bank, thereby precluding the necessity for considering the purported Constitutional and antitrust claims presented in the Petition for Writ of Certiorari; however, even if the substantive claims were considered, they are without merit.

2. The Circuits Which Have Considered The Question Have Determined That Under The Facts As Presented In The Petition For Writ Of Certiorari, There Is No Violation Of Any Of The Antitrust Laws.

The Fifth Circuit Court of Appeals in *Forrest* v. *Capital Building and Loan Assn.,* 504 F.2d 891 (1974),

cert. den. 421 U.S. 978 (1975) determined that in a similar factual situation where a federal savings and loan association allowed only its approved attorneys to close its loans, there was no violation of the Sherman Antitrust Act.

A similar decision was reached by the United States Court of Appeals District of Columbia Circuit in *Foster* v. *Maryland State Savings and Loan Association,* 590 F.2d 928 (D.C. Cir. 1978), *cert. den.* 98 S. Ct. 842 (1979).

In *Forrest* v. *Maryland Savings and Loan Association,* the Court said

> The lender has the same right as the borrower to insist on its own counsel. The Defendant lender here, after an unsatisfactory period of experience permitting the borrower to select its own counsel from a large group of highly rated lawyers (but not necessarily real estate specialists), whom the lender would then use as well, settled upon the practice of employing only one law firm to protect its interest in all these similar home loan transactions. State law and federal regulations allow the lender to charge the borrower for the legal work done for benefit of the lender as a necessary cost of the loan. Irrespective of which counsel is chosen by the borrower, the borrower will thus inevitably pay for the legal services provided to the lender. *Foster* v. *Maryland Savings and Loan Association,* 590 F.2d 930, 931.

The Circuit Court of Appeals for the District of Columbia Circuit agreed with the Fifth Circuit that a lender insisting on a particular attorney to close the loan and charging the borrower its fee was not an antitrust violation.

In *Mortensen* v. *First Federal Savings and Loan Association,* 549 F.2d 884 (3d Cir. 1977), the Third

Circuit determined that if a lawyer as in *Forrest* v. *Capital Savings and Loan Association, supra,* represented the Bank then there would be no tying arrangement. In *Mortensen* such a factual determination had not been made. *Mortensen* v. *First Federal Savings and Loan Association,* 549 F.2d 884, 899.

Subsequently, in *Mortensen* v. *First Federal Savings and Loan,* it was determined by the District Court that there was no antitrust violation as a result of the savings and loan's requiring the borrower to pay for a lawyer selected by the savings and loan. *Mortensen* v. *First Federal Savings and Loan Association,* 79 F.R.D. 603 (D.C.D.N.J. 1978).

The three circuits which have considered the issue have determined that where there is a factual determination that the attorney, at least in part, represents the lender, there is no violation of the Sherman Antitrust Act regardless of who pays or who selects the lawyers. Even if the Federal Land Bank of New Orleans is considered to be subject to the Sherman Antitrust Act, because of its private characteristics, as alleged by the Petitioner, then there would still be no antitrust issue for this Court to consider.

3. There Is No Basis For The Contention That The "Arbitrary Decisions" Of Selecting Attorneys By The Bank Is In Violation Of The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment.

Although the Fifth Amendment to the Constitution of the United States does not mention "equal protection of the laws" pursuant to *Bolling* v. *Sharp,* 347 U.S. 497 (1954) and *Buckley* v. *Valio,* 424 U.S. 1 (1976) equal protection is, of course, an element of due process.

The issue here is whether, if the Bank is a Federal agency, the classification which the list creates, directs is "alleged arbitrary decisions" against any individual or category of persons. It is contended by the Bank that the basis for selecting attorneys was by necessity arbitrary since the goal was to reduce the number of attorneys from a pool of many qualified attorneys. It is contended that under these circumstances, an "arbitrary" reduction of the number of attorneys was a rational basis for reducing the list and thereby creating a more expeditious manner of closing loans for the ranchers and farmers who borrow from the Federal Land Bank of New Orleans.

It is the position of the Bank that if there is some rational basis for reducing the number of attorneys, the method selected, even if "arbitrary" does not rise to the level of a Constitutional issue, if no class as individual was singled out for discriminatory treatment. *See Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976). There is no evidence in the record nor is it alleged, that any category was singled out for removal.

CONCLUSION

The Federal Land Bank of New Orleans has the right to select any attorneys to fulfill its statutory and regulatory duties to its borrowers and the purchasers of its bonds. If it is the Bank's decision that the number of attorneys should be reduced in order to facilitate a more expeditious loan closing procedure and thereby benefit its borrowers and/or bond holders, then it is not only the right but the duty of the Bank to reduce the number of attorneys in whatever way it selects, if no particular group or category is targeted for removal.

If, as the District Court and the Fifth Circuit Court of Appeals determined, the attorney closing loans for the Federal Land represents the Land Bank at least in part, then the Bank has the right to select and approve the attorneys that it uses regardless of who pays.

Under these circumstances, the arguments of the Board of Commissioners of the Mississippi State Bar are without merit. Even if they were considered, the three Courts of Appeals which have considered the question have found that there were no violations of the Sherman Antitrust Act when a federally chartered instrumentality restricts the attorneys who close loans even though the borrower pays the attorney's fees.

There is certainly no merit in claiming that arbitrary decisions not directed at any particular class or group constitute violations of the due process provisions of the Fifth Amendment to the United States Constitution.

The record in this cause is totally devoid of a Federal Question which would justify granting a Writ of Certiorari. Under these circumstances, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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